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Anuar bin Abd Aziz v Dato' John Lee Siew Neng & Ors

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(W)-358–03 OF 2020
LEE SWEE SENG, SUPANG LIAN AND GUNALAN MUNIANDY JJCA
20 JANUARY 2023

C *Contract — Agreement — Loan agreement — First respondent granted loans to appellant — Appellant transferred lands to second and third respondents as securities for loans — First respondent claimed for repayment of loan plus interest whereas appellant counterclaimed for return of lands to original owners*
D *— Whether loan agreements entered between appellant and first respondent were illegal, void and unenforceable — Whether lands ought to be returned to appellant and/or appellant's nominees as their original owners*

E In the High Court, the first respondent's ('R1') claim was based on two loan agreements wherein R1 granted loans to the appellant. For the first loan, the appellant transferred three lands to the second respondent by entering into sale and purchase agreement and the signing of Form 14A to execute the land transfers. For the second loan, the appellant agreed to transfer five lands to the third respondent as securities for the loan. The appellant was allowed to redeem
F the lands upon repayment of the loan. R1 claimed for the repayment of the loan plus interest whereas the appellant counterclaimed for the return of the eight lands to the original owners. The appellant's case was that he never agreed for any payment of interest in respect of both loans as claimed by R1. The crux of the appellant's defence at the High Court was that R1 was not a licensed
G moneylender when he granted the two impugned loans to the appellant and it was asserted that the two loans were for all intents and purposes friendly loans rather than money lending agreements as defined under s 2 of the Moneylenders Act 1951 ('the MLA'). The learned High Court judge ('learned judge') allowed R1's claim and dismissed the appellant's counterclaim. Hence,
H this appeal by the appellant. The issues for consideration were: (a) whether the loan agreements entered between the appellant and R1 were illegal, void and unenforceable; and (b) whether the lands ought to be returned to the appellant and/or the appellant's nominees as their original owners.

I **Held**, varying the order of the High Court with no order as to costs:

(1) The learned judge's finding of fact that R1 was not carrying out a moneylending business was premised on a careful and thorough consideration and appraisal of the evidence as a whole. His finding was clearly supported by the weight of evidence and hence was not

misconceived. The presumption under s 10OA of the MLA applied on the instant facts based on the principle that a friendly loan was opposed to a normal borrowing from a moneylender from a financial institution in that the borrower was only obligated to repay the loan within a specified period of time with no interest charged, was a rebuttable presumption. Regardless of whether s 10OA of the MLA applied to this case, the fact remained that there was ample evidence to prove on a balance of probabilities that R1 was not carrying on a moneylending business at the time of giving out the impugned loans. The learned judge's findings were not 'plainly wrong' and did not justify appellate intervention (see paras 40–42 & 45).

(2) A restitutionary remedy may be ordered to prevent injustice or unjust enrichment to any contracting party regardless of whether s 66 of the Contracts Act 1950 provided for it to remedy an injustice. The circumstances of the case strongly pointed to the conclusion that the sale and purchase transactions were not sale and purchase agreements simpliciter and that they were in reality meant to serve as a security for the two loans. Since the eight lands were all along intended as security for the loans, the appellant and his nominees would be entitled to redeem the properties upon repayment of the loans. The respondents' enrichment was unjustified taking into consideration the fact that the value of the eight lands was far higher than the sums loaned to the appellant (see paras 48–50).

(3) The interest of RM2m for the loan to be repaid within two weeks should be disallowed as it was not a term that the appellant had agreed to freely. To qualify for a friendly loan there must be no exorbitant charging of interest way beyond the prescribed rate for a secured loan under the MLA. The appellant was ordered to pay the balance sum of RM7,409,688.04 and costs plus interests within 60 days from the day of the judgment and thereupon the respondents should deliver a valid and registrable memorandum of transfer together with the issue documents of title to all the eight properties to the appellant (see para 53).

[Bahasa Malaysia summary

Di Mahkamah Tinggi, tuntutan responden pertama ('R1') adalah berdasarkan dua perjanjian pinjaman di mana R1 memberikan pinjaman kepada perayu. Bagi pinjaman pertama, perayu memindahkan tiga tanah kepada responden kedua dengan menandatangani perjanjian jual beli dan menandatangani Borang 14A untuk melaksanakan pindah milik tanah. Bagi pinjaman kedua, perayu bersetuju untuk memindahkan lima tanah kepada responden ketiga sebagai jaminan untuk pinjaman tersebut. Perayu dibenarkan menebus tanah-tanah tersebut selepas pembayaran balik pinjaman. R1 menuntut pembayaran balik pinjaman dengan faedah manakala perayu menuntut balas untuk mengembalikan lapan tanah itu kepada pemilik asal. Kes perayu ialah

dia tidak pernah bersetuju untuk sebarang pembayaran faedah berhubung kedua-dua pinjaman seperti yang dituntut oleh R1. Inti dari pembelaan perayu di Mahkamah Tinggi ialah R1 bukan pemberi pinjaman wang berlesen apabila dia memberikan kedua-dua pinjaman yang dipertikaikan kepada perayu dan menegaskan bahawa kedua-dua pinjaman itu adalah untuk semua maksud dan tujuan pinjaman persahabatan dan bukannya perjanjian pinjaman wang sebagai ditakrifkan di bawah s 2 Akta Pemberi Pinjam Wang 1951 ('Akta'). Hakim Mahkamah Tinggi yang bijaksana ('hakim yang bijaksana') membenarkan tuntutan R1 dan menolak tuntutan balas perayu. Oleh itu, rayuan ini oleh perayu. Isu untuk pertimbangan adalah: (a) sama ada perjanjian pinjaman yang dibuat antara perayu dan R1 adalah tidak sah, terbatal dan tidak boleh dikuatkuasakan; dan (b) sama ada tanah itu patut dikembalikan kepada perayu dan/atau penama perayu sebagai pemilik asalnya.

Diputuskan, mengubah perintah Mahkamah Tinggi tanpa perintah berkenaan kos:

(1) Penemuan fakta hakim yang bijaksana bahawa R1 tidak menjalankan perniagaan pinjaman wang adalah berdasarkan pertimbangan dan penilaian yang teliti dan cermat terhadap keterangan secara keseluruhan. Penemuannya jelas disokong oleh pemberatan keterangan dan oleh itu tidak disalah anggap. Anggapan di bawah s 10OA Akta terpakai pada fakta ini berdasarkan prinsip bahawa pinjaman persahabatan adalah bertentangan dengan pinjaman biasa daripada pemberi pinjaman wang daripada institusi kewangan kerana peminjam hanya bertanggungjawab untuk membayar balik pinjaman dalam tempoh tertentu masa tanpa faedah dikenakan, adalah anggapan yang boleh disangkal. Tidak kira sama ada s 10OA Akta digunakan untuk kes ini, hakikatnya masih terdapat keterangan yang mencukupi untuk membuktikan pada imbangan kebarangkalian bahawa R1 tidak menjalankan perniagaan pinjaman wang pada masa memberikan pinjaman yang dipertikaikan. Penemuan hakim yang bijaksana tidak 'jelas salah' dan tidak mewajarkan campur tangan rayuan (lihat perenggan 40–42 & 45).

(2) Remedi restitusi boleh diarahkan untuk mencegah ketidakadilan atau pengayaan tidak adil kepada mana-mana pihak yang berkontrak tanpa mengira sama ada s 66 Akta Kontrak 1950 memperuntukkan ia untuk meremedi sesuatu ketidakadilan. Keadaan kes itu jelas menunjukkan kesimpulan bahawa urus niaga jual beli bukanlah perjanjian jual beli secara ringkas dan ia sebenarnya bertujuan untuk menjadi jaminan bagi kedua-dua pinjaman itu. Memandangkan lapan tanah itu bertujuan sebagai jaminan untuk pinjaman, perayu dan penamanya berhak untuk menebus hartanah tersebut selepas pembayaran balik pinjaman. Pengayaan responden adalah tidak wajar dengan mengambil kira hakikat bahawa nilai lapan tanah itu jauh lebih tinggi daripada jumlah yang dipinjamkan kepada perayu (lihat perenggan 48–50).

(3) Faedah sebanyak RM2 juta untuk pinjaman yang perlu dibayar dalam tempoh dua minggu tidak boleh dibenarkan kerana ia bukanlah satu terma yang dipersetujui oleh perayu secara bebas. Untuk melayakkan pinjaman persahabatan, tiada caj faedah yang terlalu tinggi melebihi kadar yang ditetapkan untuk pinjaman bercagar di bawah Akta. Perayu telah diperintahkan membayar jumlah baki RM7,409,688.04 dan kos serta faedah dalam tempoh 60 hari dari hari penghakiman dan selepas itu responden hendaklah menyerahkan memorandum pemindahan yang sah dan boleh didaftarkan bersama-sama dengan surat ikatan hak milik kepada kesemua lapan hartanah kepada perayu (lihat perenggan 53).]

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)
Chow Yoong Hong v Choong Fah Rubber Manufactory [1962] AC 209, PC (refd)
Chow Young Hong v Choong Fah Rubber Manufactory [1962] 1 MLJ 74, PC (refd)
Dato' Tan Chin Woh v Dato' Yalumallai @ M Ramalingam s/o V Muthusamy [2016] 5 MLJ 590, FC (refd)
Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441, FC (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)
Ho Weng Leong v Ng Kee Chin [1996] 5 MLJ 139, HC (refd)
Mahmood bin Ooyub v Li Chee Loong and other appeals [2020] MLJU 1868, CA (refd)
Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67, FC (refd)
Ngui Mui Khin & Anor v Gillespie Bros & Co Ltd [1980] 2 MLJ 9, FC (refd)
RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd [2010] 2 MLJ 188, FC (refd)
S Quarry Sdn Bhd v Desaru Development Corp Sdn Bhd [2019] MLJU 99, CA (refd)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395, CA (refd)
Sundaram a/l Subramaniam v Alamrio Properties Sdn Bhd & Ors [2016] MLJU 476; [2016] 10 CLJ 645, HC (refd)
Tan Aik Teck v Tang Soon Chye [2007] 6 MLJ 97, CA (refd)
UEM Group Berhad (previously known as United Engineers (M) Bhd v Genisys Integrated Pte Ltd & Anor [2018] Supp MLJ 383, FC (refd)

Legislation referred to

Bills of Exchange Act 1946
Contracts Act 1950 ss 24, 66
Moneylenders Act 1951 ss 2, 5, 5(1), (2), 10OA, 15
National Land Code Form 14A

Rules of Court 2012 O 18 r 11

Appeal from: *Dato' John Lee Siew Neng v Anuar bin Abdul Aziz* [2020] MLJU 1130 (High Court, Kuala Lumpur)

Kuldeep Kumar a/l Jamna Dass (with Athari bin Bahardin) (Kuldeep Kumar & Co) for the appellant.
Andrew Chiew Ean Vooi (with Nicola Tang Zhan Ying and Colin Yoong Shern Zian) (Lee Hishammuddin Allen & Gledhill) for the respondent.

Gunalan Muniandy JCA:

INTRODUCTION

[1] In the High Court, the first respondent/plaintiff's ('R11's') claim was based on two loan agreements wherein R11 granted loans to the defendant/appellant ('D'). As securities for the loans, D transferred three lands to respondent 2 ('R12') and five lands to respondent 3 ('R13') which were redeemable upon full repayment of the loans. R11 claim for repayment of the said loan plus interest whereas D counterclaimed for the return of the eight lands transferred as securities to their original owners. This is an appeal by D against the judgment of the learned High Court judge ('LJ') allowing 'R11's claim and dismissing D's counterclaim.

BRIEF FACTS

First loan

[2] Sometime in December 2014, upon the appellant's request, R11 agreed to lend the appellant a sum of RM2m. The appellant agreed to transfer three lands to R11 and/or his nominees as securities for the loan by entering into sale and purchase agreement and the signing of Form 14A to execute the land transfers.

[3] The appellant transferred GM 1303 Lot 2819 and GM 1313 Lot 2816 to Naspermai ('R13') (R11's nominee) and GRN 1983 Lot 2935 to R11 as securities for the loan. The appellant was allowed to redeem the three lands upon repayment of the loan.

[4] The appellant repaid RM460,000 for the first loan.

Second loan

[5] Sometime in February 2015, the appellant requested for another loan and agreed to transfer five lands as securities for the loan. A total of five lands

were transferred to Maxvogue ('R12') (R11's nominee) from the appellant and his nominees namely the appellant's GM 185 Lot 2483 and GM 1385 Lot 4371, 3A Plantations' GRN 115 Lot 2538, Adlil Shah bin Anuar's GM 1370 Lot 4370 and Fadzarudin Shah bin Anuar's GM 1384 Lot 4368. A

[6] For the second loan, the appellant requested for a loan of RM22m. However, R11 had allegedly failed to fulfil his obligation for the said loan as agreed whereby R11 had only transferred a total sum of RM4,813,688.04 to the appellant. On the other hand, R11 claimed that he had furnished a sum of RM5,869,688.04 to the appellant for the second loan and had purportedly rejected a third request from the appellant for a loan of RM22m. B C

[7] The appellant and/or his nominees were allowed to redeem the five lands upon repayment of the loan.

[8] R11 contended that the appellant had agreed to repay RM4m for the first loan within two weeks and an additional RM115,000 per month until full repayment of the first loan. D

[9] For the second loan, R11 contended that the loan sum agreed was RM6.8m with a repayment of RM8m. E

[10] The appellant's case is that he never agreed for any payment of interest in respect of both loans as claimed by R11.

[11] R11's claims against the appellant are as follows: F

(a) RM2m and RM5,869,688.04 as principal sum for the loans given to the appellant;

(b) RM2m and RM115,000 per month (from May 2015 until full settlement) as interest for the first loan (the claim of interest of RM115,000 per month was withdrawn by R11 at the end of the High Court trial); G

(c) RM1,035,827.30 as interest for the second loan; H

(d) interest at 5%pa on the judgment sum; and

(e) costs.

[12] The appellant counterclaimed, inter alia, for the return of the eight lands to their original owners ie the appellant, 3A Plantations, Adlil and Fadzarudin. I

[13] On 3 February 2020, the LJ delivered the judgment as follows:

A (a) the appellant to pay R11 an amount of RM10,445,515.30 ('judgment sum'), being:

(i) RM3,540,000 in relation to the first loan; and

(ii) RM6,905,505.34 in relation to the second loan;

B (b) the appellant to pay R11 pre-judgment interest on the judgment sum at a rate of 5%pa calculated from the notice of demand issued on 7 January 2016 until the date of this judgment, 3 February 2020;

C (c) the appellant to pay R11 post-judgment interest on the judgment sum at a rate of 5%pa calculated from 4 February 2020 until the date of full and final settlement by the appellant to the R11;

(d) the appellant's counterclaim is dismissed;

D (e) the appellant to pay R11 costs of RM120,000 subject to payment of allocator fees;

(f) if the appellant fails to settle the costs of RM120,000 within 60 days from the date of this judgment, the appellant to pay R11 interest on the costs of RM120,000 at a rate of 5%pa until the date of full and final settlement by the appellant to the R11; and

E (g) the original payment vouchers tendered in court and marked as exhs P5A to P5J be released and returned to R11.

F **[14]** Hence, the appellant filed an appeal vide notice of appeal dated 28 February 20202 against the High Court judgment.

OUR DECISION

G **[15]** Our analysis will be centred on the appellant's grounds of appeal which, in summary, raise these issues:

(a) whether the loan agreements entered between the appellant and Dato' John (R11) are illegal, void and unenforceable; and

H (b) whether the lands ought to be returned to the appellant and/or the appellant's nominees as their original owners.

[16] The material determinative issues in this case as identified by the learned High Court judge are as follows:

I (a) in relation to the first loan, whether the parties had agreed that, if the first loan was not repaid within two weeks, the appellant would have to pay the respondent RM4m in settlement of his obligations;

(b) in relation to the second loan, whether:

(i) the amount of the loan was:
(1) for a sum of RM6.8m, with the amount of repayment of RM8m to be repaid within six months, as alleged by the respondent; or
(2) for sum of RM22m, as alleged by the appellant; and

(ii) the respondent proved that RM1,056,000 was disbursed in cash to the appellant;

(c) whether the appellant was liable to the respondent under the Bills of Exchange Act 1946 for the cheques that were drawn by the appellant in favour of the respondent that were dishonoured;

(d) whether the friendly loans were unenforceable under s 15 of the Moneylenders Act 1951 or void under s 24 of the Contracts Act; and

(e) whether the sale and purchase agreements by which the lands were transferred to the respondent and his nominee companies as security for the friendly loans were sham agreements and thus void, and if so whether the vendors of the lands were entitled to restitution.

[17] There were seven principal grounds of appeal outlined in the memorandum of appeal ('MOA') as follows:

(a) there was no agreement to repay RM4m under the first loan;

(b) the second loan was for RM22m and not for RM6.8m with an obligation to repay RM8m;

(c) for the second loan, the appellant did not receive RM1,056,000 in cash from the first respondent;

(d) the interest payable under the second loan should not be pro-rated;

(e) the sale and purchase agreements were illegal moneylending agreements and contravened MA 1951;

(f) the HC failed to find the lands were merely held as security and ought to be returned upon full repayment of the judgment sum;

(g) the first respondent (R11) is not entitled to claim the losses purportedly arising from non-completion of the share sale agreement between Sfive Properties Sdn Bhd ('Sfive') and Flora Prospects Sdn Bhd ('Flora'); and

(h) the HC failed to draw an adverse inference against the R11 for not calling the solicitors, Messrs Lau, Wong & Partners, as witnesses.

[18] It was pointed out to us that, notably, the appellant did not in its MOA challenge the High Court's finding that the sale and purchase agreements were not a sham making it a non-issue.

[19] We would at the outset state briefly the law relating to appellate intervention. We agree with the appellant that the approach that an appellate court must adopt when hearing appeals against decision reached after a full trial is settled as pronounced by the Federal Court in the case of *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 at p 10, where it was held that:

> [14] In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention, ie to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention, ie that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test.

[20] Likewise, it is also trite law that an appellate court hearing an appeal from a trial court will not interfere with the findings of the trial court unless it appears that the trial judge has misdirected himself or herself on the law or the facts; or has made findings which are against the weight of the evidence; or the decision arrived at is plainly wrong (see Court of Appeal cases of *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 and *S Quarry Sdn Bhd v Desaru Development Corp Sdn Bhd* [2019] MLJU 99).

[21] In support of this appeal, the principal issue raised by the appellant was whether the loan agreements entered into between the appellant and R11 were illegal, void and unenforceable on the basis that he was not a licensed moneylender when he granted two separate loans to the appellant. It was disputed that the two loans were merely friendly loans rather than moneylending agreements ('MLAs') as defined under s 2 of the Moneylenders Act 1951 ('the MLA 1951').

[22] As to the relevant definitions, s 2 of the MA 1951 provides that:

> 'moneylender' means any person who carries on or advertises or announces himself or holds himself out in any way as carrying on the business of moneylending, whether or not he carries on any other business.
>
> 'moneylending' means the lending of money at interest, with or without security, by a moneylender to a borrower.
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> 'moneylending agreement' means an agreement made in writing between a moneylender and a borrower for the repayment, in lump sum or instalments, of

money borrowed by the borrower from the moneylender.

[23] It was the appellant's case that based on his testimony at the trial as to how he came to be introduced to R11 and his request to R11 through the introducer for a RM2m loan and the events that followed R11 could only have been a moneylender.

[24] As regards the allegation that R11 had been carrying on the business of moneylending, s 10OA of the Moneylenders Act 1951 provides that in any proceedings against any person where it is alleged that such person is a moneylender, proof of a single loan at interest made by such person shall raise a rebuttable presumption that such person is carrying on the business of moneylending. That person may then adduce evidence to rebut the presumption by proving that he is not carrying on a moneylending business.

[25] Interest is defined in s 2 of the Moneylenders Act 1951 as follows:

> 'interest' does not include any sum lawfully charged in accordance with this Act by a moneylender for or on account of stamp duties, fees payable by law and legal costs but, save as aforesaid, includes any amount by whatsoever name called in excess of the principal paid or payable to a moneylender in consideration of or otherwise in respect of a loan.

[26] At the outset, we would emphasize that the crux of the appellant's defence at the court below was that R11 was not a licensed moneylender when he granted the two impugned loans to the appellant and it was asserted thereof that the two loans were for all intents and purposes friendly loans rather than money lending agreements as defined under s 2 of the MLA. From the factual matrix, it was contended that the most probable inference was that at the material time of the present transactions, R11 was carrying on a moneylending business which would explain why the introducer specifically introduced R11 to the appellant. As such, it was contended that the LJ's finding that the mere fact that a loan was granted cannot amount to a holding out that Dato' John was carrying on a business of moneylending is wrong for lack of judicial appreciation of evidence (see Federal Court case of *UEM Group Berhad (previously known as United Engineers (M) Bhd v Genisys Integrated Pte Ltd & Anor* [2018] Supp MLJ 383) and is a plain error in law.

[27] A summary of the appellant's submission as to the key facts in relation to R11 being in the moneylending business is that in view of s 10OA of the MLA, Dato' John (R11) shall be presumed to be carrying on the business of moneylending for the following reasons:

(a) the fact that Dato' John had granted and/or entertained not one, but two (three, according to his own testimony) loan request from the appellant;

A (b) Dato' John had imposed interest on the said loans ie repayment in excess of the principal sum; and

(c) lending of money at interest is essentially the definition of 'moneylending' in the Moneylenders Act 1951.

B

[28] Reference was made to the Privy Council case of *Chow Young Hong v Choong Fah Rubber Manufactory* [1962] 1 MLJ 74, where it was held at p 77 that:

C

> In order to prove that a man is a money-lender within the meaning of the (Moneylenders) Ordinance, it is necessary to show some degree of system and continuity in his moneylending transactions. If he were left to discharge this burden without the aid of any presumption, a defendant might be frequently be in a difficulty. He might have had only one or two transactions with the money-lender and he might find it difficult to obtain evidence about the business done by the
>
> D money-lender with other parties. Section 3 enables a defendant to found his claim on proof of a single loan made to him at interest, it being presumed, in the absence of rebutting evidence, that there were sufficient other transactions of a similar sort to amount to a carrying on of business.

E

[29] It was also impressed upon us that the facts in the Court of Appeal ('COA') case of *Mahmood bin Ooyub v Li Chee Loong and other appeals* [2020] MLJU 1868 are uncannily similar to the circumstances surrounding the present case in that the defendant in that case was persuaded to enter into a

F business venture and decided to borrow a sum or RM250,000. He was introduced by an acquaintance to one Ponytail Lee who assured the defendant that he could lend the money but needed the title to the property owned by the defendant as security for the repayment of the loan who was then asked to sign a blank and undated sale and purchase agreement. The COA upheld the

G defendant's assertion that the moneylending transaction was done under the cloak of an alleged sale and purchase transaction, hence illegal and unenforceable.

[30] On the issue of the presumption under s 10OA of the MLA, the COA

H remarked, inter alia, that:

> [230] ... At any rate even a single loan at interest is enough to raise the presumption of that person carrying on the business of moneylending under the amendment effected by the Moneylenders (Amendment) Act 2011 which came into force on 15 April 2011. It introduced s 10OA which according to the Explanatory Statement
>
> I to the Bill, seeks to facilitate the proof of business of moneylending. Section 10OA makes it even more difficult for a lender who had charged interest on the loan given to say it was a one off transaction by allowing a legal presumption to be drawn against the lender as follows:
>
> ...

[233] The presumption of moneylender has not been rebutted.

[234] The unlicensed moneylender cannot under the guise of not being covered by the Moneylenders Act 1951 take shelter in the freedom of contract in that parties can create contractual obligations not prohibited by the Act. The moment a court of law makes a finding that the transaction is moneylending and the fact that the lender is not licensed to lend with interest that makes the whole agreement no matter how it is structured, into an illegal moneylending agreement which is unenforceable under s 15 of the Moneylenders Act 1951.

[31] In essence, the crucial issue for our determination was whether a single loan at interest is sufficient to raise the rebuttable presumption under s 10OA of the MLA that the lender is carrying on a business of moneylending. While the appellant's primary position was that a single loan transaction where interest was charged was sufficient for the presumption of carrying on a moneylending business to be invoked, the contrary position taken by the respondent was that the learned judge's decision on this central issue was ultimately a finding of fact supported by ample evidence that at the material time of the loans granted to the appellant, R11 was not carrying on the business of moneylending within the meaning of the MLA.

[32] It was the appellant's contention that the LJ misapplied the law on s 10OA of the MA 1951 when he held that the presumption under s 10OA is not applicable to civil proceedings. We share the respondents' view that notwithstanding the LJ's interpretation of s 10OA which in our view is open to question ultimately the determining question would be whether there was ample evidence, as highlighted by R11, that he was not carrying on the business of moneylending. We were urged to appreciate that, importantly, moneylending per se is not prohibited under the MLA. 'The Act was never intended to apply to an individual who lends money even with interest unless he makes a business from it' — *Sundaram a/l Subramaniam v Alamrio Properties Sdn Bhd & Ors* [2016] MLJU 476; [2016] 10 CLJ 645 at para [34].

[33] It is important for us to note the principle in *Ngui Mui Khin & Anor v Gillespie Bros & Co Ltd* [1980] 2 MLJ 9 at 12EG (left) where it was emphasised that:

At the outset we wish to observe that the Moneylenders Ordinance, 1951 does not apply to moneylending but only to moneylenders. It does not make every moneylending transaction illegal and unenforceable. It is only a moneylending transaction of a moneylender which is the subject-matter of the Ordinance and must comply with its provisions on pain of being declared illegal and unenforceable by the court.

[34] We do not propose to discuss the plethora of authorities on the issue at hand but would stress the importance of differentiating between isolated acts of

A moneylending and engaging in the business of moneylending as aptly described by Lord Devlin in *Chow Yoong Hong v Choong Fah Rubber Manufactory* [1962] AC 209 at p 218 as follows:

> To lend money is not the same thing as to carry on the business of money-lending. In order to prove that a man is a moneylender within the meaning of the Ordinance, it is necessary to show some degree of system and continuity in his moneylending transactions.

B

[35] We acknowledge that s 5 of the MA 1951 makes it mandatory for a person to be licensed before that person can carry out the 'business of moneylending'.

C

[36] While the appellant relied on s 15 of the MA 1951, which states 'No moneylending agreement in respect of money lent after the coming into force of this Act by an unlicensed moneylender shall be enforceable,' the respondents brought to our attention the fact that this was however not his pleaded case. It is trite law that a claim can only be determined on matters and issues that are specifically pleaded to support the claim. Importantly, a moneylending agreement as expressly defined in s 2 of the MLA must be an agreement made in writing. Without proof that R11 and the appellant had entered into an agreement made in writing, s 15 of the MLA would not afford any assistance to the appellant.

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[37] In our considered view, the LJ had adequately and carefully considered the material facts and evidence relevant to the issue at hand when he concluded that the appellant clearly failed to establish that R11:

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(a) carried on;

(b) advertised;

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(c) announced himself as carrying on; or

(d) held himself out as carrying on,

H a moneylending business within the meaning of s 5(1) and (2) of the MLA 1951. Without proving this, the appellant's allegation fails — *Barisan Tenaga*; affirmed by the Court of Appeal in *Dr Mansur bin Hussain*.

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[38] The LJ took into consideration the evidence as a whole at the trial material to the central question as to whether R11 was carrying on the business of moneylending, particularly the fact that he was a businessman running a business of supplying building materials through various companies, which was undisputed. He also considered several other undisputed facts in relation to how both the first and second loans came to be granted to the appellant.

Amongst others, the appellant had failed to call as a witness the introducer of the lender ('R11') for the second loan, who was a material witness as to whether R11 was in the moneylending business as alleged.

[39] In arriving at the finding that R11 had not lent money systematically and continuously for gain to be regarded as having engaged in a moneylending business, the finding was based on the evidence of the conduct of R11 prior to the present oral agreements.

[40] We do not propose to discuss the correctness of the LJ's view that under s 10OA of the MLA the presumption only applies to criminal proceedings, there being two schools of thought on this issue of law. It would suffice for us to state that, to our minds, the LJ's finding of fact that R11 was not carrying out a moneylending business was premised on a careful and thorough consideration and appraisal of the evidence as a whole. His finding was clearly supported by the weight of evidence and hence, in our considered view, was not misconceived.

[41] On the premise that the presumption under s 10OA, MLA applied on the instant facts based on the principle that a friendly loan is opposed to a normal borrowing from a moneylender from a financial institution in that the borrower was only obligated to repay the loan within a specified period of time with no interest charged, we must bear in mind that it is a rebuttable presumption (*Tan Aik Teck v Tang Soon Chye* [2007] 6 MLJ 97).

[42] We are in full agreement with the respondents' position that regardless of whether s 10OA applies to this case, the fact remains there was ample evidence to prove on a balance of probabilities that R11 was not carrying on a moneylending business at the time of giving out the impugned loans.

[43] We share the respondents' view that the first, second, third and fourth grounds that we have mentioned concern findings of fact based on facts and evidence adduced at trial. We hold that the findings are not 'plainly wrong' and do not justify appellate intervention (see *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 at para [14]).

[44] In conclusion, on the issue of liability of the appellant as pleaded by the respondents, for the foregoing reasons, we are inclined to agree with the respondents' contention that the LJ had not erred in his findings on the core determinative issues material to the claim as follows:

(a) on the first loan, that from the objective facts based on contemporaneous documents, R11 had made out his case, there existed an agreement that the appellant would repay RM4m for the first loan;

(b) as regards the second loan, that 'on the facts' there was no agreement for a RM22m loan, and 'the agreement between the parties was for a sum of RM6.8m'. For this loan, the appellant received RM5,869,688.04 which includes RM1,056,00 in cash;

(c) on illegality, that there was no breach of licensing requirements under s 15 of the MLA 1951 as R1 was not carrying out the business of moneylending; and

(d) the appellant's counterclaim that the seven sale and purchase agreements were sham agreements has to be dismissed because there was 'no evidence of any common intention the plaintiff and the defendant (or even between respective vendors and purchase of the lands) that the sale and purchase agreements were not to create binding rights and obligations that they gave the appearance of creating'.

Hence, appellate interference was not called for in respect of the above.

[45] On the other grounds advanced in the appellant's defence, we also agree with the respondents that these concern findings of fact which the LJ arrived at based on facts and evidence adduced at trial. The findings are not 'plainly wrong' and do not justify appellate intervention (see *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 at para [14] and *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67 at pp 118–119).

[46] We will, lastly, deliberate on the LJ's decision to refuse an order of restitution of the lands held as security as sought by the appellant. On this issue, the respondents contended that the LJ did not err in allegedly refusing to order restitution as he had acted consistent with settled principles. It is not the duty of the court to invent or create a cause of action or a defence under the guise of doing justice for the parties: see *Dato' Tan Chin Woh v Dato' Yalumallai @ M Ramalingam s/o V Muthusamy* [2016] 5 MLJ 590 (FC) at paras [12]–[16] and *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188 (FC) at paras [31]–[37].

[47] The appellant, on the contrary, contended that, notwithstanding that restitutionary remedy had not been prayed for, the power of the court to grant this remedy is an issue of law. It was contended that, a plain reading of O 18 r 11 of the Rules of Court 2012 makes it clear that a point of law need not be pleaded as the word 'may' in the said rule is permissive rather than mandatory. That being the case, the failure of a party to mention it in the pleadings must not be held against him (see *Ho Weng Leong v Ng Kee Chin* [1996] 5 MLJ 139).

[48] We concur with the appellant that a restitutionary remedy may be

ordered to prevent injustice or unjust enrichment to any contracting party regardless of whether s 66 of the Contracts Act 1950, provides for it to remedy an injustice. In the Federal Court case of *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331, it was held, inter alia, that:

> That the justice of the case should be overriding consideration is axiomatic. After all, courts exist to do justice according to the law as applied to the substantial merits of a particular case. And rules of court and of practice are created to facilitate the attainment of justice, not its obstruction.

[49] We also agree with the appellant that the circumstances of the case strongly point to the conclusion that the sale and purchase transactions were not SPAs simpliciter and that they were in reality meant to serve as a security for the two loans.

[50] Hence, in line with the respondents' own pleaded case that the eight lands were all along intended as security for the loans, the appellant and his nominees would be entitled to redeem the properties upon repayment of the loans. It was highlighted to us by the appellant that the respondents' enrichment is unjustified taking into consideration the fact that the value of the eight lands, ie, RM23.2m, is far higher than the sums loaned to the appellant, ie, RM6,813,688.04.

[51] Reference was made to the Federal Court case of *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441, where it was held at p 484 that:

> [117] The principle underlying the cases of *Banque Financiere de la Cite v Parc (Battersea) Ltd* and *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v IRC* is that, in the context of the present case, a cause of action in unjust enrichment can give rise to a right to restitution, where it can be established that:
>
> (a) the plaintiff must have been enriched;
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> (b) the enrichment must be gained at the defendant's expense;
>
> (c) that the retention of the benefit by the plaintiff was unjust; and
>
> (d) there must be no defence available to extinguish or reduce the plaintiff's liability to make restitution.

[52] Restitutionary remedies focus on unjust enrichment to a contracting party at the expense of the claimant and may be ordered by court in appropriate cases in a range of factual circumstances (see *Dream Property*).

A CONCLUSION

[53] For the foregoing reasons and under the circumstances that we have alluded to, our decision and the orders that we made at the conclusion of the appeal are as follows:

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(a) we find no good reason to disturb the general findings of fact of the LJ except that the loans taken amounted to only RM7,409,688.04 as supported by ten cash vouchers. A sum of RM460,000 had been repaid leaving a balance sum of RM7,409,688.04;

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(b) interest of RM2m for the loan to be repaid within two weeks should be disallowed as it is not a term that the appellant had agreed to freely. We also disagree with the award of interest of RM115,000 per month which the respondents did not pursue;

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(c) to qualify for a friendly loan there must be no exorbitant charging of interest way beyond the prescribed rate for a secured loan under the MLA;

(d) to conclude, we, therefore, vary the judgment of the High Court and allow the plaintiff/respondents to enter judgement for the sum of RM7,409,688.04 together with interest at 5% pa from date of demand of 7 January 2016 till date of High Court judgment on 3 February 2020 and thereafter, interest on the judgment sum at 5%pa till realisation;

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(e) the appellant shall be ordered to pay the above sum and costs plus interest, including for costs, within 60 days from today and thereupon the respondents shall deliver a valid and registrable memorandum of transfer ('MOT') together with the issue documents of title to all the eight properties to the appellant's solicitors;

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(f) in the event that the appellant fails to so make payment by the end of the 60 days period, the respondents shall be at liberty to proceed with a public auction of all the eight properties pursuant to the procedure for sale of land under the National Land Code ('the NLC') and the ROC and the excess sum if any after the payment of the full judgment sum plus interest and costs together with the costs and expenses of the auction shall be refunded to the appellant;

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(g) the order of the High Court is varied only to the above extent; and

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(h) we exercise our discretion and make no order as to costs for this appeal.

Order of High Court varied with no order as to costs.

Reported by Nabilah Syahida Abdullah Salleh